United States Court of Appeals

for the Second Circuit

APPENDIX

75-7347

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES WYPER, JR.

vs.

PROVIDENCE WASHINGTON INSURANCE COMPANY

AN APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX

PAUL W. ORTH of
HOPPIN, CAREY & POWELL
266 Pearl Street
Hartford, Conn. 06103

PAGINATION AS IN ORIGINAL COPY

Complaint

1. Plaintiff is a citizen of the State of Connecticut and resides in West Hartford, and the defendant is an insurance corporation incorporated under the laws of the State of Rhode Island having its principal place of business in Providence, Rhode Island at 20 Washington Place.

2. The matter in controversy exceeds exclusive of interest and costs the sum of ten thousand ($10,000) dollars.

3. In 1966 and for many years prior thereto, the plaintiff had been an employee of Hartford Fire Insurance Company and had attained an executive position.

4. In September, 1966, the plaintiff left such employment to become executive vice-president of the defendant, with the understanding that he would shortly thereafter become defendant's president.

5. At the time plaintiff joined the defendant, and as a further inducement to his change of employment, the defendant agreed that plaintiff would be credited under its pension plan with past prior service from September 1, 1940.

6. Defendant had and still has a pension plan among the provisions of which are the following:

> "...any employee who, after being ten years continuously in the service of the Company, shall become physically or mentally incapacitated to fill his or her position may be retired by a majority vote of the Pension Board from active service. Service with other similar institutions may be considered as with this Company for the purpose of calculating the term of service."

7. In late 1967 and/or early 1968 the defendant manifested the symptoms of becoming, and/or became, an alcoholic.

8. As a consequence of such alcoholism, plaintiff in the Spring of 1968 became physically or mentally incapacitated to fill his position as defendant's president.

9. In May 1968, the defendant discharged or "retired" plaintiff from active service.

10. Although defendant's Pension Board did not formally vote plaintiff's retirement, such action under the circumstances of plaintiff's discharge or retirement was either an unnecessary act or was in effect accomplished by the close identity between the members of the Pension Board and defendant's officers or directors who obliged defendant to retire.

11. Plaintiff was then and still is entitled to receive a pension from defendant, in an amount of about $20,000 annually, being half his then annual salary.

12. Defendant continues to neglect to pay plaintiff any pension, but only says it will evaluate his rights when he reaches age 65, which will be on October 27, 1982.

13. [By Amendment] Defendant's failure to award plaintiff an early retirement pension was arbitrary or in bad faith or fraudulent, and constituted a breach of contract.

WHEREFORE, the plaintiff demands judgment against defendant for the sum of $20,000, and that the court adjudge that defendant must henceforth pay plaintiff an annual pension of $20,000; and further that plaintiff recover his costs.

Dated at Hartford, Connecticut this 16th day of January, 1973.

Answer

1. Paragraphs 1, 3, 4 and 5 are admitted.

2. The defendant neither admits nor denies the allegations contained in Paragraphs 2, 7 and 8, but leaves the plaintiff to his proof thereof.

3. So much of Paragraph 6 as alleges, "and still has" is denied. The remaining allegations contained in said Paragraph 6 are admitted.

4. Paragraphs 9 and 11 are denied.

5. So much of Paragraph 10 as alleges, "defendant's Pension Board did not formally vote plaintiff's retirement," is admitted. The remaining allegations contained in said Paragraph 10 are denied.

6. As to the allegations contained in Paragraph 12, the defendant denies that it "continues to neglect", but admits that it does not pay the plaintiff any pension and that it will evaluate his rithts, if any, when he reaches age sixty-five on October 27, 1982.

First Special Defense

The plaintiff tendered his resignation by letter attached hereto and marked Exhibit A.

Second Special Defense

The plaintiff entered into an agreement for the full satisfaction of all claims against the defendant by letter attached hereto and marked Exhibit B.

Exhibit B in Answer (being Court Exhibit A)

(Written on defendant's letterhead, dated May 7, 1968 and directed to the Secretary.)

I understand that I will be paid sums equal to my salary for the remainder of May and for June and July and I accept these in full satisfaction of all claims against Providence Washington Insurance Company or any of its subsidiaries or any officer or director of Providence Washington Insurance Company or of any officer or director of any of its subsidiaries which I have on account of salary, severance pay, or any other matter, except, of course, such rights as I have as a stockholder of any of those companies.

Yours truly,

/s/ James Wyper, Jr.

Oral Opinion of Blumenfeld, J. (TR 278-286)

We have a unique procedural question here, and that is the propriety of directing a verdict in the middle of the defendant's case - that is, directing a verdict for the defendant in the middle of the defendant's case.

There is a case in which the issue came up and there is dicta in that case that implies that doing that is permissible if it doesn't prejudice the plaintiff.

I suppose that prejudice to the plaintiff could arise if there is sort of a reservation by the defendant - this is not when the motion is appropriate or when you could appropriately rule upon it, but whether prejudice could be implied in a case where the defendant wants to reserve the right to then put on evidence for the purpose of again moving for a directed verdict. I'm not sure whether that would constitute prejudice.

I wouldn't think that that, in itself, would be prejudicial. The prejudice that might have existed in this case I think has been overcome by reopening the plaintiff's case so that he could fully meet an anticipatory defense that had crept in. So I suppose it is appropriate to rule on the motion for a directed verdict at this time.

I'm disposed to grant the motion. I would say primarily by adopting or following the standard in Matthews vs. Swift & Company, which says that the plaintiff has the burden of proving such a clear case of physical or mental incompetency to fulfill his job requirements that no honest tribunal could reach any other decision; and the burden of proving that any other decision would be arbitrary, fraudulent or in bad faith.

Now, we discussed that before and it did appear, I thought, that there was evidence from which an honest tribunal could say that at the time of the separation from employment of this plaintiff an honest tribunal could say that he was not then mentally or physically disabled from carrying on the duties of his job.

As I have indicated, I think the fact that he was drinking and that that may have impaired his capacity at times is to be distinguished from - let me have that exhibit - "...physically and mentally incapacitated to fill his position".

Now, as I say, if the burden is on the plaintiff to establish that no honest tribunal could reach any other conclusion, then I think we have to take account actually of the medical testimony of Dr. Nichols and of Dr. Fischer.

Dr. Fischer's testimony is certainly inconclusive, certainly does not establish that no other decision could honestly be reached, unless the decision maker was arbitrary, fraudulent or acting in bad faith.

And I think the fair import of Dr. Nichol's testimony was that at a time, a month, two months or three months before he saw him, depending of course on the amount of drinking that had occurred in the meantime, that it would be possible to have a different opinion as to whether he was at the time of severance physically or mentally incapacitated to fill his position.

So on that basis I find that there has been a failure of the plaintiff to prove an essential element of the case and on that ground that a verdict ought to be directed for the defendant.

Now, there is an additional ground, and that has to do with the question of the release.

I might say, to go back for a minute, that the standard I have adopted is one that is expounded and set forth in Matthews vs. Swift & Company, 465 Fed. 2nd 814, and apparently derived from what was considered to be the applicable law under the choice of law doctrine there from New York.

The choice of law here would require that the standard be determined according to the law of Rhode Island. Counsel have assured me and our own research indicates that there is no law in Rhode Island that deals specifically with this point, so I feel free to adopt that rule which I think represents the better view and, therefore, do adopt the rule in Matthews.

The other point has to do with the effectiveness of the release, Exhibit A. One challenge to its effectiveness has been that the parties did not intend to include within the rights released any right to a pension.

Well, I don't think there is sufficient evidence here to justify any jury in finding that there was an intention to exempt any rights that Mr. Wyper might have had to a pension.

The other challenge to the validity of the release I think is that he was so drunk that he was incapable of understanding the consequences of his act, or that drunkenness, at any rate, on his part was sufficient to void the release.

I don't know what the law is in Rhode Island, but there is law in Connecticut and the law in Connecticut which I think is applicable and which may be, therefore, applied in this case is that in Caulkins vs. Fry, which as I've cited before is at 35 Conn. 170.

In Caulkins vs. Fry, in a case reserved for the advice of the Supreme Court, an auditor had found that the defendant signed the note. This was a note upon which the defendant was sought to be held liable, had signed the note with his own hand, but by reason of his intoxication was incapable of understanding the consequences of his act and was unfit to transact business.

Also, that he had sufficient consciousness to remember the next morning that he had signed the note and he thereupon repudiated the contract, returned the property from which the note was given and demanded of the payee the surrender of the note.

The Supreme Court of Connecticut in that case said: "excessive drunkenness where the party is utterly deprived of the use of his reason and understanding is not found, certainly not in terms, and we think the finding" - that is, that the finding that his intoxication by reason that he was incapable of understanding the consequences of his act and he was unfit to transact business - "...is not equivalent to that on the facts found or, on the contrary, the facts found seem to indicate a less degree of intoxication. He was capable of writing his name insofar as appears in a manner not to excite suspicion."

Now in this case we have the signature and it is admittedly the signature of Mr. Wyper - I was going to just discuss some facts for a minute - that is, admittedly that the signature on the release is the signature of Mr. Wyper and the only testimony about his condition at the time of his signing it is that he doesn't remember signing it. And he doesn't remember it at all.

There is some testimony that he had some drinks that day, early that morning, possibly at noon, and possibly before Mr. Branch got in to see him. Just how much and what his condition

was, I think we don't know. Perhaps having forgotten that he signed it he forgot all about the whole thing. But what his condition was at the time Mr. Branch was there is kind of speculative.

Mr. Branch testifies that when he was there there was no indication in Mr. Wyper's conduct or appearance that he was then under the influence of liquor or incompetent in any way to transact business.

But again we run into this problem of burden of proof. Let's assume that this is a voidable transaction if Mr. Wyper was, in fact, so intoxicated that he was unfit to transact business; that is, understand in a reasonable manner the nature and consequences of the transaction, or was unable to act in a reasonable manner in relation to the transaction.

We don't have anything except the testimony of Mr. Branch that everything was reasonable, that they discussed the fact that he was giving up other fringe benefits - a question that was raised by Mr. Wyper. But if that is not believed, it doesn't mean the opposite is true.

The question then is whether the plaintiff has proved here that the other party, in this case Mr. Branch, had reason to know that by reason of intoxication Mr. Wyper was unable to understand in a reasonable manner the nature and consequences of the transaction, or that he was unable to act in a reasonable manner in relation to the transaction.

And that is the rule that is set out in the Restatement of the Law Section to Contracts. I have it here in a tentative draft of April 13, 1964, on Page 73, Section 18(d), titled "Intoxicated Persons".

This is an alternate ground, that is, that the plaintiff has not proved that Mr. Branch had reason to know or to believe that Mr. Wyper, by reason of intoxication, was unable to understand in a reasonable manner the nature and consequences of the release, or unable to act in a reasonable manner in relation to the transaction.

I shall, therefore, direct the jury to bring in a verdict for the defendant.

* * *

The case I was referring to when I indicated that this is a novel question as to the stage at which a motion for directed verdict could be entertained is the case of Panotex Pipe Line against Phillips Petroleum Company, 457 F 2nd 1279.

* * *

To Jury: The Court has considered the evidence which has been presented in this case and has ruled that on the basis of that evidence the plaintiff is not entitled to recover and the jury is directed to retire and come back and report that you have arrived at a verdict for the defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable M. Joseph Blumenfeld, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff recover nothing of the defendant and that this action be and is hereby dismissed on the merits, with costs to the defendant.

Dated at New Haven, Connecticut, this 27th day of May, 1975.

Sylvester A. Markowski, Clerk of Court

Frances J. Consiglio, Deputy In Charge